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July 29, 2010



Hon. Nicholas G. Garaufis, U.S.D.J.
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

**Re: United States, et al. v. City of New York
Civ. Action No. 07-cv-2067 (NGG) (RLM)**

Dear Judge Garaufis:

Yesterday, Plaintiffs-Intervenors joined with the United States to reply to the City's letter of July 27, 2010. (City Letter, Dkt No. 497; Plaintiffs' Joint letter, Dkt No. 499). The City's additional submission of today (Dkt No. 500) warrants a further brief response, for Your Honor to consider if you find that the City's use of Exam 6019 is not job related and consistent with business necessity.

First, we emphasize that the City bears a heavy burden to show that an Academy class must be installed on August 30, 2010 even if such hiring violates Federal, State and City anti-discrimination laws. As the Court stated in its January 21, 2010 initial relief order,

At this point in the litigation, the court has an obligation to ensure that the City does not utilize discriminatory testing practices to hire entry-level firefighters. See Guardians, 630 F.2d at 109 ("Once an exam has been adjudicated to be in violation of Title VII, it is a reasonable remedy to require that any subsequent exam or other selection device receive court approval prior to use.")

(Dkt No. 390 at 32) (emphasis added).

Neither Plaintiffs-Intervenors nor the United States has ever argued, as the City now claims, that the Court should "eliminate from consideration all candidates" who took Exam 6019. (Dkt No. 500 at 2-3). Rather, we are asking that before discriminatory hiring is permitted by this Court, the City be required to produce evidence of any purported public safety concerns

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that it asserts would result from a delay in hiring. Now that the City has decided to notify candidates of their selection on August 5, 2010, the Plaintiffs-Intervenors and the United States are left with no option other than to insist that this information be produced immediately.

As we pointed out in Court, our clients know of no instance in which mandatory overtime has been assigned, much less of any widespread problem in that regard. On the contrary, we are advised that many, if not most, firefighters welcome the opportunity to add several hours a week to their schedules. Nor does there appear to be any reluctance by the City to further reduce firefighter staffing. This year, Mayor Bloomberg advocated the closure of 20 fire companies along with staffing reductions in 60 additional engine companies. (See Ex. A). The passage of the City budget avoided immediate reductions, but just last week at a *Crain's Business* breakfast forum, Deputy Mayor Stephen Goldsmith responded to a question about fire service redundancies by reiterating the probability that the administration would recommend additional firehouse closings. (A video of the July 20, 2010 presentation is available at: <http://media.crainsnewyork.com/title,92ed466f>). Of course, the City, which employs 281,000 people (See Ex. B), could and would have hired additional firefighters if a true emergency loomed.

In the six (6) months since the Court's January 21, 2010 Order, the City has failed to adjust its processing of candidates to enable itself to engage in future lawful hiring.¹ This is in spite of the Court's early and clear notice to the City that rank-ordered use of Exam 6019 could very well be prohibited. The January 21 Order points to the Exam's "continue[d] pattern of disparate impact upon black and Hispanic applicants" and highlights that the extreme bunching of test takers "within 20 points of one another, rais[es] the issue of whether the examination is able to make fine distinctions between candidates' qualifications." (Dkt No. 390 at 33). The Court went on to recite the findings of Dr. Bernard Siskin that

Given the manner in which Written Exam 6019 was used to rank candidates, non-meaningful differences in score can move an applicant thousands of ranks on the eligible list.

(Id. at 34) (emphasis supplied by the Court).

¹ It should be noted that the City has demonstrated its ability to process thousands of applicants in short order. The FDNY hired more than one-thousand firefighters in 2003 and upwards of 700 to 800 firefighters in 2002, 2004, 2005 and 2006. Given this, the City's decision not to process more test-takers from the Exam 6019 eligibility list is an indication that compliance with Title VII was not a top priority for the Department. In the past, as noted in the City's July 27, 2010 letter, the City has been willing to modify appointment requirements to meet its needs. If it must hire firefighters, and if Title VII protections are to be afforded, the FDNY could make similar adjustments again.



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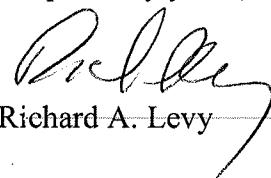
Plaintiffs-Intervenors, and particularly the Vulcan Society, would not advocate a position they believed would jeopardize either public safety or firefighter safety. As the FDNY has acknowledged, small reductions in staffing are not a public safety issue. Fire Commissioner Salvatore Cassano told NY1 on June 4, 2010 that he did not think safety would be compromised as a result of the closure of 20 fire companies or the reductions in engine company staffing that were proposed by Mayor Bloomberg. (See Ex. C) The inconsistencies in the administration's position in public and in this Court seem glaring.

Second, we strongly oppose the City's suggestion, in both its letters of July 27 and today, that the Court should permit future hiring from a limited group of the "top scorers" on Exam 6019. The City's proposed band would actually raise the cutoff score of the test again to 83.586, a level even higher than Dr. Cline's latest proposal of 80.000. (Dkt No. 497 at 2). There is *no* evidence that hiring from the top of the Exam 6019 list would be "rational" or more likely to result in candidates passing their Academy training. (Dkt No. 500 at 3). Moreover, the City fails to inform the Court that it has already appointed firefighters who scored in the low 70s on Exam 6506, the EMT promotional test that is identical to Exam 6019. Among those hired from the 6506 eligibility list, and now employed as NYC firefighters, are persons with scores as low as 72.876. Clearly, individuals with scores well below the City's arbitrary, and shifting, pass marks are fully capable of performing the job. There is no basis upon which to limit the opportunities of all Exam 6019 test takers, whose scores on that exam have not been shown to predict their suitability to serve as firefighters.

In short, the City should be required to hire without discriminatory impact on black and Hispanic applicants. If the Court is to consider alternatives because of concerns about public safety, the City should be required to prove that public safety cannot be achieved without discriminatory selections.

Thank you for your consideration.

Respectfully yours,


Richard A. Levy

RAL:jos
cc: All counsel via ECF.

EXHIBIT A

From New York Post website:

http://www.nypost.com/p/blogs/knickerbocker/fire_department_still_socked_in_ePFLJEG6daSA7CfsJAWaaN

Fire Department still socked in budget

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12:16 PM, May 6, 2010 | By DAVID SEIFMAN

He's restoring cuts to the NYPD, but Mayor Bloomberg won't be sparing the Fire Department when he releases his \$64 billion budget today.

Sources said Bloomberg is proceeding with plans to shut 20 engine companies to save \$37.4 million.

The actual firehouses house other firefighting units and would remain open.

The mayor is also looking to reduce manning at 60 of the busiest engine companies from five to four firefighters per rig to save another \$7.9 million.

Bloomberg's plan, which has to be approved by the City Council, would leave the FDNY with 400 fewer firefighters.

On the flip side, the Fire Department hopes to raise \$2 million by charging a fee after for answering false alarms transmitted by automatic devices. The fee would kick in after the third false alarm in six months.

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EXHIBIT B

The New York Times

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October 15

January 9, 2009

City Employee Pay Is Outpacing Private Sector, Report Says

By DAVID CHEN

Bolstered in part by Mayor Michael R. Bloomberg's spending, the average New York City employee cost the city \$107,000 a year in wages, health insurance, pension and other benefits in the 2008 fiscal year, an increase of 63 percent since 2000, according to a new report.

City worker compensation grew twice as fast as that of employees in the private sector and elsewhere in the public sector during the same period, the Citizens Budget Commission said in the report, which was released on Thursday. The increase was driven by contractual raises that outpaced the inflation rate, and by the rising cost of health insurance and pension benefits, said the commission, a business-backed research group.

The group said those benefits have remained "exceptionally generous" under Mr. Bloomberg.

And with the city staring at a projected \$7 billion deficit by 2011, fiscal watchdogs are intensifying their calls for the Bloomberg administration to act more aggressively to control employee costs.

"These skyrocketing costs are stunning," said Carol Kellermann, president of the Citizens Budget Commission, "and they impose an enormous, and growing, burden on increasingly strained taxpayers. Corrective action is essential and can no longer be delayed."

Mr. Bloomberg has long defended giving healthy raises to the city's workforce of 281,000 to attract the best people and make city jobs competitive with those in the suburbs. Some critics contend that recent contracts he has negotiated with teachers and police officers, among others, are too generous, and have been driven by Mr. Bloomberg's political aims as he seeks warm relations with powerful unions.

Critics also say that Mr. Bloomberg has not been forceful enough addressing soaring health and pension benefit costs. Those costs have jumped by 182 percent since 2000, according to the Citizens Budget Commission, in contrast to a 52 percent increase for other state and local governments, and a 40 percent increase for private industry.

Part of the reason that health benefits have jumped so much, the report said, is the city's longstanding practice, unchanged by Mr. Bloomberg, to pay 100 percent of health insurance premiums for employees and their families, as well as for retirees and their spouses. The report noted that "Most other employers require their workers to pay some share of the premium."

Other factors are beyond the mayor's control, according to the report, such as actuarial recalculations and lower investment returns, as evidenced recently by the impact of the recession.

Still, Charles M. Brecher, the commission's research director, said: "His record is mixed. On the pay side, he started out doing a terrific job, based on productivity, but his performance has slipped. On fringe benefits I don't think he's been aggressive enough to tackle the problems."

Mr. Bloomberg has had some success, however, battling the Legislature's seemingly endless desire to sweeten pension benefits. Last month, Mr. Bloomberg developed the local component of an ambitious plan unveiled by Gov. David A. Paterson seeking to reduce benefits for newly hired state and local workers by creating a new pension category, which would require employees to work longer and retire later to receive pension benefits, a move long opposed by the unions.

Indeed, the Citizens Budget Commission praises that proposal, and urges the State Legislature to pass it. "I think the report is very clear," said Marc LaVorgna, a Bloomberg spokesman. "It lays the blame at the foot of pension costs. Costs for employees are always going to go up. That's not irregular. But we have been extraordinarily burdened by a pension system that we have no control over."

The report recommends that the city do more to restructure health insurance costs by negotiating with the Municipal Labor Committee. The administration hopes to save \$200 million; the commission says "larger savings should be pursued on a more urgent basis."

Asked about spiraling health care costs, Mr. LaVorgna said: "Rapidly rising costs are not unique to New York City government. That's a national problem and there's really not a local solution to what's a national health care problem."

Over all, the report found that city employee pay rose to an average of \$69,000 annually as of last June 30, up from \$52,000 in 2000, an annual increase of 3.6 percent, while inflation rose an average of 3.2 percent during the same period. Average benefits now cost almost \$38,000 a year, up from \$13,000 a year.

Thanks to overtime and other supplemental payments, firefighters have an average annual compensation package totaling \$186,000, the highest among city employees. Department of Education employees cost the city almost \$99,000 annually.

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EXHIBIT C



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TOP STORIES

Updated 06/04/2010 11:05 PM

FDNY Revisits Planned Fire House Closures

By: Amanda Farinacci

In the face of budget cuts, the New York City Fire Department said at a City Council hearing on Friday that it is revising its list of planned fire house closures. NY1's Amanda Farinacci filed the following report.

Twenty fire companies around the city are slated to close due to budget cuts, but exactly which ones remains unclear.

Fire Commissioner Salvatore Cassano insisted at a city council hearing Friday that his department is still working on it.

"We were prepared on May 17, we were still finalizing the list that morning and then when we were told not to send the list out," he said.

Fire officials were told not to by City Hall, which said it was still hoping for aid from Albany. However, there is still no state budget.

On Friday, Cassano promised to deliver a list in the next two weeks, news that didn't sit well with council members, who said they deserve to know which neighborhoods will be affected.

"We continue to look at it. what we thought we might have to do later that day we were told not to. So we continue to analyze. Every day we're analyzing," said Cassano.

Closing 20 fire companies would save some \$40 million. FDNY officials have also proposed reducing staffing in 60 engine companies from five firefighters to four, to save \$17 million.

To do that, the FDNY must reach an agreement with the firefighters' union.

Cassano said Friday he did not think safety would be compromised, but Uniformed Firefighters Association President Stephen Cassidy said that is not true.

"Without having a roof man or an [outside vent man] to vent a building, people's lives will be clearly lost, firefighters will be in danger, and he shuffled it off like it means nothing," said Cassidy. "His 40 years of experience -- it was shocking what he said today."

Last year, when budget cuts threatened to close 16 fire companies, the City Council was able to restore funding to keep those companies open.

This year, City Council members said it is the mayor's turn to spare the FDNY from the budget ax:

"That restoration was the will of the council at that time, and if anybody thinks that we're going to have to come back year after year and have this same discussion, we will if we have to, but it should be off the table," said Bronx Councilman James Vacca.

The City Council vowed to fight the cuts and do whatever it can to keep fire companies open.

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